

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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New England Power Company)	D.T.E. 02-33
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**MOTION OF NEW ENGLAND POWER COMPANY
FOR A PROTECTIVE ORDER**

New England Power (“NEP” or the “Company”) hereby requests that the Department of Telecommunications and Energy (the “Department”) grant protection from public disclosure of certain confidential, competitively sensitive and proprietary information submitted in this proceeding in accordance with G.L. c. 25, § 5D.

I. INTRODUCTION

On May 17, 2002, NEP filed with the Department a Petition for Approval of Asset Divestiture, docketed by the Department as D.T.E. 02-33 (the “Petition”). The Petition seeks approval by the Department for the sale of NEP’s 9.95766 percent joint ownership interest in the nuclear power plant known as Seabrook Station (“Seabrook”), which is an operational 1,161-megawatt (“MW”) nuclear generating unit located in Seabrook, New Hampshire, to FPL Energy Seabrook, LLC (“FPLE Seabrook”) and findings concerning the divested assets as eligible facilities for exempt wholesale generator (“EWG”) status under Section 32 of the Public Utility Holding Company Act of 1935 (15 U.S.C. § 79z-5a) (“PUHCA”).

On June 14, 2002, the Office of the Attorney General (“Attorney General”) submitted information requests to the Company regarding, inter alia, the Company’s evaluation of the bids for Seabrook and the Companies’ analyses regarding the future market price of power that were used to evaluate the purchase power contract bids. On June 17, 2002, the Department issued its first set of information requests to the Company. The Department’s requests also seek information from the Company comparing the terms offered by each of the final bidders for Seabrook, and describing the projections, assumptions and estimates used in analyzing a purchase power agreement from Seabrook. The responses to these information requests contain proprietary, confidential and highly sensitive competitive information for which NEP requests protection from public disclosure.

For the reasons set forth below, NEP requests that the Department issue a protective order to limit disclosure of the requested proprietary, confidential and highly sensitive competitive information to the Attorney General and the Department only.¹ FPLE Seabrook does not object to this Motion.

II. LEGAL STANDARD

Confidential information may be protected from public disclosure in accordance with G.L. c. 25, § 5D, which states in part that:

The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be on the proponent of such protection to prove the need for such protection. Where the need has been

¹ NEP has executed a Non-Disclosure Agreement with the Attorney General (see Attachment A, hereto) whereby NEP will disclose competitively sensitive information to the Attorney General, subject to the Attorney General limiting review and distribution of the information to his staff and technical consultants, as noted in the Non-Disclosure Agreement.

found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

In interpreting the statute, the Department has held that:

...[T]he burden on the company is to establish the need for protection of the information cited by the company. In determining the existence and extent of such need, the Department must consider the presumption in favor of disclosure and the specific reasons why disclosure of the disputed information benefits the public interest.

The Berkshire Gas Company et al., D.P.U. 93-187/188/190, at 16 (1994) as cited in Hearing Officer's Ruling On the Motion of Boston Gas Company for Confidentiality, D.P.U. 96-50, at 4 (1996).

In practice, the Department has often exercised its authority to protect sensitive market information. For example, the Department has determined specifically that competitively sensitive information, such as price terms, are subject to protective status:

The Department will continue to accord protective status when the proponent carries its burden of proof by indicating the manner in which the price term is competitively sensitive. Proponents generally will face a more difficult task of overcoming the statutory presumption against the disclosure of other terms, such as the identity of the customer.

Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996).

See also Colonial Gas Company, D.P. U. 96-18, at 4 (1996) (the Department determined that price terms were protected in gas supply contracts and allowed Colonial Gas Company's request to protect pricing information including all "reservation fees or charges, demand charges, commodity charges and other pricing information").

Moreover, the Department has recognized that competitively sensitive terms in a competitive market should be protected and that such protection is desirable as a matter of public policy:

The Department recognizes that the replacement gas purchases ... are being made in a substantially competitive market with a wide field of potential suppliers. This competitive market should allow LDC's to obtain lower gas prices for the benefit of their ratepayers. Clearly the Department should ensure that its review process does not undermine the LDC's efforts to negotiate low cost flexible supply contracts for their systems. The Department also recognizes that a policy of affording contract confidentiality may add value to contracts and provide benefits to ultimate consumers of gas, the LDC's ratepayers, and therefore may be desirable for policy reasons.

The Berkshire Gas Company et al., D.P.U. 93-187/188/189/190, at 20 (1994).

Most recently, the Department has recognized the highly sensitive nature of market information in the context of the sale of a nuclear generation facility. A Hearing Officer of the Department recently approved the separate requests of Cambridge Electric Light Company and Western Massachusetts Electric Company to protect information that related directly to the auction of the Vermont Yankee Nuclear Power Station, or pertained to the bidders or material facts concerning their bids in the context of that auction. See Cambridge Electric Light Company, D.T.E. 01-94 (Amended Motion of Cambridge Electric Light Company for a Protective Order) (approved May 9, 2002); Western Massachusetts Electric Company, D.T.E. 01-99 (Western Massachusetts Electric Company's Amended Motion for Protective Treatment) (approved May 9, 2002).

III. THE INFORMATION REQUESTED BY THE DEPARTMENT AND THE ATTORNEY GENERAL IS HIGHLY SENSITIVE AND WARRANTS PROTECTION FROM DISCLOSURE

NEP requests confidential treatment of specific information related to the auction process, bids received, and NEP's analysis of the Seabrook bids, including the evaluation of the purchase

power contract bids, because the information is proprietary, confidential and highly competitively sensitive.²

Information Request AG 3-1 seeks “unredacted copies of all documents, correspondence, analyses and work papers produced by the Company’s employees, consultants, agents and others as part of the evaluation process of the bids.” Information Request AG 3-2 seeks copies of “all materials, scripts and other supporting documents prepared or made available for the corporate management and corporate board meetings regarding the sale of Seabrook,” including minutes to such meetings. DTE-NEP-1-5 requests that the Company “provide a chart comparing the terms offered by each of the final bidders for Seabrook with the criteria that the Company believed were most important in selecting the winning bid.”

Disclosure of the confidential material responsive to the above-referenced requests would substantially harm the effectiveness and competitiveness of auctions for nuclear and other assets in New England. First and foremost, public release of this information could endanger the sale of Seabrook itself. JPMorgan, the auction agent for Seabrook, has treated the names of bidders, communications with the bidders and bid information and analysis (the “Auction Information”) as confidential throughout the auction process. The Auction Information has been tightly controlled and has not been distributed outside of JPMorgan, jurisdictional public regulatory agencies, or, to the extent applicable, outside the management or counsel of the selling joint owners of Seabrook. All

² Also being filed today is a Motion of J.P. Morgan Securities Inc. (“JPMorgan”) for Confidential Treatment (“JPMorgan Motion”) regarding a number of information responses that contain similar proprietary, confidential and highly competitively sensitive information, that are in the possession of and under the control of JPMorgan. The JPMorgan Motion seeks a Protective Order regarding responses to Information Requests DTE-NEP-1-3, DTE-NEP-1-4, DTE-NEP-1-7, DTE-NEP-1-8, DTE-NEP-1-11, DTE-NEP-1-12, DTE-NEP-1-13, DTE-NEP-1-14, DTE-NEP-1-15, DTE-NEP-1-17; portions of AG-1-2 and AG-1-3, AG-1-4, AG-1-5, AG-1-6, AG-1-7, AG-1-8, AG-1-9, AG-1-

bidders were told that the auction process would be conducted in a highly confidential manner. The process was designed this way to encourage participation, promote competition in the bidding process, and maximize the proceeds from the bidding. Any disclosure now could significantly damage the Seabrook divestiture. Additionally, many bidders consider the structure and terms of their respective bids to be proprietary, confidential and competitively sensitive, so if the bids submitted or the analysis of the bids submitted in the Seabrook auction were to be released, competitors would become aware of such data and many bidders would likely be more reluctant to submit responses in any subsequent auction. Accordingly, the release of bid information or bid analysis would potentially prejudice this auction and any future auction process and ultimately harm Massachusetts customers.

Additionally, New England Power Company's Board of Directors meeting minutes contain confidential and commercially sensitive information regarding the auction process and how the Company evaluated the Seabrook bids. Attendance at the Board Meetings of NEP is not open to the public. Attendance by non-Board members is at the discretion of the Board and in compliance with corporate law.

NEP also seeks protection from producing competitively sensitive market price information obtained during the Seabrook auction process. DTE-NEP-1-18, requests the rationale supporting NEP's decision not to purchase power from Seabrook after the sale, including "the projections, assumptions and estimates used in reaching this decision, as well [] as all related work papers and schedules." Information Request AG 3-4 seeks a copy of "the Henwood Study and any other

10, AG-1-11, AG-1-12, AG-1-14, AG-1-15, AG-1-16, AG-1-15(2), AG-1-16(2), AG-1-17, AG-1-18, AG-1-25, AG-1-26, AG-1-27, AG-1-28, AG-1-30, AG-1-31.

studies or analyses that forecast the power market that were used to evaluate the purchase power contract bids.”

In advance of receiving the bids for Seabrook, NEP solicited expressions of interest from parties interested in purchasing NEP’s potential Seabrook entitlement. NEP utilized such responses to evaluate the purchase power contract bids. Information regarding wholesale energy pricing submitted in response to a competitive solicitation is proprietary, competitively sensitive information. Bidders to a competitive solicitation generally submit responses with an understanding that their identity, pricing terms, and how they structure a transaction will not be revealed publicly. The Department has often exercised its authority to protect such sensitive market information. Release of this information to the public could harm customers in the context of future power procurement in Massachusetts.

Accordingly, consistent with recent precedent,³ NEP requests that the Department protect the above-referenced information from public disclosure for a period of 10 years from the date of the Department’s final Order in this matter. In addition, NEP requests an opportunity to petition the Department to maintain the documents as confidential for an additional 10 years if the Company should deem it necessary at the end of the initial 10-year period. Therefore, after a period of 10 years, unless the Department extends the period, the material in question will become public.

NEP recognizes that it is in the public interest to make submitted documents available to the public at some point in the future and believes that the ten-year period balances the interests of the parties to the sale of Seabrook with the interest in making the material public.

³ See, e.g., Cambridge Electric Light Company, D.T.E. 01-94 (Amended Motion of Cambridge Electric Light Company for a Protective Order) (approved May 9, 2002).

IV. CONCLUSION

NEP respectfully requests that the Department grant this Motion, and thereby issue a Protective Order for the information contained in the responses to information requests DTE-NEP-1-5 and DTE-NEP-1-18, and the Attorney General's information requests AG 3-1, AG 3-2, and AG 3-4, for a period of 10 years from the date of the Department's final Order in this proceeding; provided that NEP may request protected treatment for an additional 10 years at the end of the original ten-year term. This approach will allow the Department and the Attorney General to review the auction process and provide a mechanism to ensure that proprietary, confidential and highly sensitive auction information will remain confidential.

WHEREFORE, for the reasons set forth herein, NEP respectfully requests that the Department allow its Motion for a Protective Order.

Respectfully submitted,

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